IN THE

SUPREME COURT OF THE UNITED STATES.

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased, Petitioners, —against— JOSEPH T. HIGGINS, as Collector of Internal Revenue for the Third District of New York.	October Term, 1945. Number

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinions of the Circuit Court of Appeals is not yet reported, but is dated April 10, 1945 and is found in the record at page 80, *et seq.* One of the opinions of the United States District Court is reported (Judge Leibell), at 50 Fed. Supp. 188. The opinion of Judge Symes of the District Court is not reported but is found at page 68, *et seq.* of the record.

II.

JURISDICTION.

1. The date of the judgment (order for mandate) to be reviewed is April 26, 1945 (R. 87). The three months within which a writ of certiorari may be applied for does not, therefore, expire until about July 26, 1945 and the foregoing Petition will have been filed long before said latter date.

2. The Circuit Court of Appeals based its decision in part upon its construction of Regulations 80, Article 34, of Treasury Regulations, which presents an important question of practice to be followed in Federal estate tax proceedings and has in its holding run counter to the decisions of this Court as to *res adjudicata*.

3. A definite reference to the statutory provision under which jurisdiction of this Court is invoked is Judicial Code Section 240 (U. S. C. Sec. 347) subdivision (a).

4. A reference to the cases believed to sustain the jurisdiction of this Court are those set forth on the Appendix to the Petition to which this Brief is annexed. (*Supra*, p. 11.)

III.

STATEMENT OF THE CASE.

Alfred W. Erickson, a resident of Manhattan, New York City, New York, died on November 2, 1936, and his will was thereafter admitted to probate by the New York County Surrogate (R. 2, 3). Letters Testamentary were issued to Petitioners who are the qualified and acting Executors of said will (R. 3). Petitioners, on February 1, 1938, duly filed the Federal estate tax return on decedent's estate and at the same time exercised the option given to them by Section 302(j) of the Revenue Act of 1926 as amended by Section

404 of the Revenue Act of 1934 and Section 202(a) of the Revenue Act of 1935, to have the value of the estate determined as of a date one year after Mr. Erickson's death (R. 39). The Commissioner of Internal Revenue, acting pursuant to Article 11 of Treasury Regulations 80, which purported to be an interpretation of legislation pertaining to the assessment of Federal estate taxes, thereafter included in the gross of decedent's taxable estate $242,050.93, the income earned by said estate during the year following Mr. Erickson's death (R. 18, 19). The inclusion of this income resulted in an unlawful increase of the total Federal estate tax on said estate and Petitioners paid this unlawful tax (R. 19).

Petitioners, claiming that said year's income was not principal of said estate and therefore not taxable in estate tax proceedings, duly filed on October 24, 1939 with Respondent a claim for refund of the increased tax caused by the inclusion of said year's income in the principal of said estate and on November 24, 1949 filed an amended claim for such refund (R. 53, 58, 51). The Commissioner of Internal Revenue completely rejected both the original and the amended claim for refund (R. 51).

An action known in the record as Action No. 1 was instituted by Petitioners against Respondent to recover the payment of the excess tax caused by the inclusion of said year's income in the principal of said estate (R. 47, 48). This Court decided the case of *Maass* v. *Higgins*, 312 U. S. 443, which held that said Article 11 of Treasury Regulations 80 was beyond the power of the Commissioner to make and there was, therefore, nothing for the Respondent to do but to refund to Petitioners such unlawfully exacted tax. The Respondent thereupon repaid to Petitioners the unlawfully exacted tax, with interest, and said Action No. 1 was, in July, 1942, in pursuance of a stipulation of the parties, dismissed with prejudice (R. 6, 7, 67).

The Petitioners had employed the law firm of Phillips & Avery to file said claims for refund and to bring and conduct

said Action No. 1 and, shortly after the dismissal of said Action No. 1 as aforesaid and on August 1, 1942, said Phillips & Avery rendered to Petitioners a bill for their services in connection with said Action No. 1 in the sum of $18,346.18, and the Petitioners paid said bill on or about August 21, 1942 (R. 7, 37). The Petitioners on or about September 14, 1942 then filed with Respondent a second and further claim for the refund of $7,668.69, with interest, which represented the amount by which said Federal estate tax theretofore paid by Petitioners would be reduced if said $18,346.18 bill was allowed as an "administration expense" of said estate (R. 10, 11, 13). Said second claim for refund so filed on September 14, 1942, was rejected by the Commissioner of Internal Revenue on or about November 16, 1942 (R. 13, 14). Upon the rejection of said last-mentioned claim for refund, the Petitioners began this action (known in the record as Action No. 2) in the United States District Court for the Southern District of New York (R. 2, 9). The Respondent then moved to dismiss said Action No. 2 on the ground that the complaint did not state a claim upon which relief could be granted (R. 17). Such motion for dismissal came on for argument before Judge Leibell of the District Court who rendered an opinion (found at 50 Fed. Supp. 188 and in the record at page 18) in which he held that the complaint in said Action No. 2 *did* state a claim upon which relief could be granted (R. 29). Certain stipulations of facts found in the record at page 30, *et seq.* and page 45, *et seq.* were then entered into by the parties and the case then came on for trial before Judge Symes of the District Court without a jury, and he held that Petitioners proved a claim which warranted judgment in their favor and judgment was accordingly entered for Petitioners (R. 68, 74, 76).

The Respondent then appealed to the United States Circuit Court for the Second Circuit which reversed said judgment of the United States District Court and dismissed the complaint in this Action No. 2 (R. 77, 85). The Circuit Court wrote an opinion in which it first said that Treasury Regulations 80, Article 34, set forth at page 18 *infra* of this

brief, did not apply to this case and then said that such Regulations did provide for the deduction in said Action No. 1 of prospective attorneys' fees under the circumstances of said Action No. 1, and further held that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2 (R. 80, *et seq.*).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred: (a) In finding and deciding that Article 34 of Treasury Regulations 80 (1934 Edition) required the recovery in said Action No. 1 of the excess tax on said estate which would have been brought about by the allowance of said attorneys' fees as an "administration expense" of said estate; and (b) in failing to find and decide that said attorneys' fees could not have been asserted as an "administration expense" of said estate in said Action No. 1; and (c) in finding and deciding that said excess tax on said estate brought about by the allowance of said attorneys' fees as an "administration expense" of said estate could not be recovered in this Action No. 2.

2. The Circuit Court of Appeals erred in finding and deciding that said Action No. 1 was *res adjudicata* of the issues asserted in this Action No. 2.

3. The Circuit Court of Appeals erred in finding and deciding that it had jurisdiction to require that the issues asserted in this Action No. 2 should have been asserted in said Action No. 1.

V.

ARGUMENT.

Summary of Argument.

POINT A. The decision of the Circuit Court has given Article 34 of Treasury Regulations 80 (1934 Edition) an interpretation not warranted by the language or purposes of said Article 34.

POINT B. The dismissal of Action No. 1 with prejudice was not *res adjudicata* of the issues presented in this Action No. 2.

POINT C. The Circuit Court of Appeals was without jurisdiction to require that the issues asserted in this Action No. 2 should have been asserted in said Action No. 1.

POINT A.

THE DECISION OF THE CIRCUIT COURT HAS GIVEN ARTICLE 34 OF TREASURY REGULATIONS 80 (1934 EDITION) AN INTERPRETATION NOT WARRANTED BY THE LANGUAGE AND PURPOSE OF SAID ARTICLE.

Article 34 of Treasury Regulations 80 (1934 Edition) reads as follows:

> "Art. 34. Attorneys' fees.—The executor or administrator, in filing the return, may deduct such an amount as attorneys' fees as has actually been paid or which at that time it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable

remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the attorney's fees have not been paid at the time of the final audit of the return the Commissioner may disallow such part, or all, of the deduction as the circumstances may warrant, subject to such future adjustment as the facts may require.

"Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charges against the beneficiaries personally and are not administration expenses as contemplated by the statute."

(Note: This same Article 34 is now found in current Regulations 105, Sec. 81.34, without change except for clerical corrections which do not change its meaning.)

In examining said Article 34, let us first look to its language and then to its purpose, and then determine whether or not said Article 34 has any application to the state of facts before us or has the application given to it by the Circuit Court.

The language of said Article 34 shows that it is limited to and can only have application to an estimate of attorneys' fees expected to be incurred in administering an estate, said estimate to be made at the time of the filing of the Federal estate tax return, or as expressed in said Article 34, "in filing the return". This is the whole purpose and design and the beginning and the end of said Article 34 and it serves no other purpose. Said Article 34 does not apply to attorneys' fees which an estate incurs long after the filing of the Federal estate tax return (in this case, four and one-half years) and which fees were not in contemplation at the time of the filing of said return as in the instant case. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816.

The Circuit Court first came to this conclusion that said Article 34 had no application other than that which we have just expressed but strayed away from its first conclusion and said:

> "While it does not expressly apply to claims for the refund of taxes paid, it does provide for the deduction of prospective attorneys' fees which executors and administrators will incur and have to pay in administering the estate, in computing the net taxable estate subject to adjustment upon final audit. * * *"

and then found that said Article 34 was applicable to the state of facts involved in said Action No. 1 and in this Action No. 2.

The Federal estate tax return in the instant Erickson Estate was filed February 1, 1938 (R. 39). The attorneys' fees now in question did not mature and had no existence as a claim against Petitioners until a *demand* was made therefor by the attorneys who prosecuted said Action No. 1. No demand for said attorneys' fees was made upon Petitioners until said attorneys rendered their bill on August 1, 1942, after the dismissal of said Action No. 1 in July, 1942 (R. 37, 40). The demand for said attorneys' fees was not made upon Petitioners until four and one-half years after the filing of said Federal estate tax return (R. 39, 37). Under such circumstances, how can it be said that said Article 34, which is limited to an estimate of attorneys' fees at the time of the filing of a return, has any application to the case at bar?

The Circuit Court endeavored to answer this question by saying that it could see no sound reason why a fair estimate of attorneys' fees which Petitioners reasonably expected they would have to pay when they filed their claim for refund for overpaid taxes before the beginning of said Action No. 1 could not have been made in part the basis of their claim for refund even though the attorneys' fees were unascertainable in the correct amount as of that time. We know of no basis in law or practice for any such conclusion as was made by the Circuit Court as the attorneys were under no compulsion to render any bill until they saw fit to do so; the attorneys had the right to withhold their bill until they were sure of success in said Action No. 1 and then base a charge

in part on such success, and, therefore, said attorneys' fees had no maturity until after the beginning and after the dismissal of said Action No. 1. It simply will not do, as suggested by the Circuit Court, to estimate a claim in a court of law. There must be a fixed claim, notwithstanding that the judgment may be for less than claimed but the judgment can not be for more than the claim. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816. Furthermore, the claim must exist at the time of the beginning of the action or it must mature while the action is pending and then be brought in by supplemental complaint. It is not sufficient to bring into the orbit of said Article 34 or the orbit of *res adjudicata* a new and different claim even if it could have been litigated in the first action. Before *res adjudicata* will apply the claim must have been in existence at the time of the beginning of the action.

To have attempted by an amended claim for refund, as suggested by the Circuit Court, to assert said attorneys' fees by estimate in said Action No. 1 would have had the following results:

(a) The Commissioner of Internal Revenue would have asserted, as he successfully did in *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, that said claim for attorneys' fees was premature as being based upon an estimate and that it had no place in said Action No. 1.

(b) Said Action No. 1 would have been thrown into a hodge-podge, into reverse and stalled by an amended claim for refund and could not have gone forward in any particular while any amended claim for refund was pending nor until the Commissioner of Internal Revenue rejected said amended claim for refund or until six months had expired after the filing of such amended claim for refund, because it is a statutory requirement that before an action can be maintained for the recovery of a tax a claim for refund must have been filed and rejected or six months must have elapsed after

its filing and then a recovery in such an action is limited to that and that only which is set forth in the claim for refund. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. See Internal Revenue Code, Section 3772-(a)-(1) which is to the same effect as Section 1318 upon which 283 U. S. 269 just cited was decided. If in following the Circuit Court's suggestion said attorneys' fees had been estimated they should not have been allowed by the Commissioner of Internal Revenue or by any court because they had not ripened into a claim by the attorneys against the Petitioners at the time of the dismissal of said Action No. 1. The naive suggestion of the Circuit Court that the Commissioner of Internal Revenue might have waived strict compliance as to the filing of an amended claim for refund without a fixation of said attorneys' fees only puts this case into the realm of speculation and does not square with the experience of practitioners before the Bureau of Internal Revenue and to those practitioners would seem to be a frolic with the factual practice which prevails in such Bureau.

(c) Said Action No. 1 could not have gone forward in any particular even if an amended claim for refund had been filed until a supplemental complaint in Action No. 1 had also been filed so as to embrace in said Action No. 1 a claim for a reduction of Federal estate taxes because of said attorneys' fees being an "administration expense", which had the effect of reducing the taxes already paid. *United States* v. *Worley*, 281 U. S. 339.

The very fact that it was, according to the Circuit Court, necessary to file an amended claim for refund would call for a supplemental complaint to show facts that occurred after the beginning of said Action No. 1, because said attorneys' fees were not under the original complaint in said Action No. 1 an issue in said Action No. 1 and in this connection the District Court said:

> "No facts were available at the time of the first claim for refund on which any one could form any reliable estimate of what the attorneys' fees would be

> for services to be rendered in connection with the said claim for refund or with the litigation that might follow if the claim was rejected. The attorney's fees would depend on many elements—the time consumed, the intricate character of the points involved, the extent to which the claim would be litigated through the courts, and the results obtained. No one could even hazard a guess on any one of these elements at that time" (R. 22).

An amended claim for refund in said Action No. 1 would have called for a supplemental complaint before recovery could have been had in said Action No. 1 because said amended claim for refund and attorneys' fees would have consisted of "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented", *i.e.*, the complaint in said Action No. 1. See Rule 15 of Federal Rules of Practice; and *United States* v. *Worley*, 281 U. S. 339.

Rule 15, subdivision (d), of the Federal Rules of Practice covers supplemental pleadings and provides:

> "(d) *Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

It will be observed that said subdivision (d) of said Rules contains nothing more than an option to Petitioners to have included said attorneys' fees in said Action No. 1 even if said attorneys' fees had ripened into a claim against Petitioners before the dismissal of said Action No. 1. There was, under said subdivision (d), no compulsion on Petitioners, as plaintiffs in said Action No. 1, to include said attorneys'

fees in that action under penalty of *res adjudicata*. A plaintiff may, under said subdivision (d), refuse to set up by way of supplemental complaint a claim which accrues after the beginning of an action and have a recovery under his original complaint if the original complaint states a cause of action, and he may proceed to judgment under the original complaint without fear of the new claim which arose after the beginning of the action being adjudged in that action in such manner as to be *res adjudicata* of a new action brought upon the new claim arising after the institution of the first action. If this were not the law the holder of a claim definitely payable in installments would be in peril if he brought an action upon an installment already due and did not file a supplemental complaint so as to allege an installment falling due after the beginning of the action. That a plaintiff need not file a supplemental complaint under these circumstances, was the definite holding of the Court in *Carter-Crume Co.* v. *Peurrung*, 99 Fed. 888; which was cited on this point with approval by this Court in *United States* v. *Worley*, 281 U. S. 339.

The "Restatement of the Law of Judgments" covers this Point A and provides in Section 68, subdivision (2):

> "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

And also in Section 68 at page 294 the "Restatement" reads:

> "* * * where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment; it is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel."

Again at page 300 of said "Restatement" it is said:

> "A judgment on one cause of action is not conclusive in a subsequent action based upon a different cause of action as to questions of fact which might have been but were not litigated and determined in the prior action."

This Court has in decision after decision consistently applied the rules laid down in such "Restatement". *Mercoid Corporation* v. *Mid-Continent Investment Corporation*, 320 U. S. 661 and cases cited.

As above stated, there was no compulsion on Petitioners, plaintiffs in said Action No. 1, to have served a supplemental complaint in said Action No. 1 and there sought recovery of estate taxes which would have been reduced by the allowance of said attorneys' fees, and Petitioners failure to so assert said attorneys' fees in said Action No. 1 did not make said Action No. 1 *res adjudicata* of the issues in this Action No. 2. Petitioners were at liberty without penalty of *res adjudicata* to reserve the effect of said attorneys' fees on estate taxes for a new action and that is exactly what Petitioners did when they brought this Action No. 2. The holding of the Circuit Court has the effect of prolonging litigation instead of getting it settled and said Court having misconstrued said Article 34 of the Treasury Regulations the judgment of the Circuit Court should be reversed.

POINT B.

THE DISMISSAL OF ACTION NO. 1 WITH PREJUDICE WAS NOT RES ADJUDICATA OF THE ISSUES PRESENTED IN THIS ACTION NO. 2.

Petitioners concede that the dismissal of said Action No. 1 with prejudice was a final judgment on the merits which bars a second action between the same parties for the same cause of action or claim as therein asserted, but Petitioners

strenuously insist that this Action No. 2 does not in any way seek to recover on anything involved in said Action No. 1 and that this Action No. 2 is founded upon a new claim which had no existence at any stage of said Action No. 1. Under such circumstances there is no *res adjudicata*. *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661 and cases cited. The cases of *U. S.* v. *Parker*, 120 U. S. 89; *Baker* v. *Cummings*, 181 U. S. 117; *Tait* v. *Western Maryland Railroad Co.*, 289 U. S. 620; and *Guettel* v. *U. S.*, 95 F. (2d) 229, certiorari denied 305 U. S. 603; relied upon by the Circuit Court herein stand for nothing more than that which we have above conceded.

We shall discuss in detail the *Guettel* case, because that is the case upon which the Commissioner of Internal Revenue wholly relied in rejecting Petitioners' second claim for refund upon which this Action No. 2 is founded and upon which the Circuit Court largely relied for the conclusion that the issues in said Action No. 1 were *res adjudicata* of the issues in this Action No. 2 (R. 12, 14, 80, *et seq.*). Petitioners claim that the *Guettel* case differs just one hundred percent from the case at bar and the basis of this claim of difference is as follows:

In the *Guettel* case there had been included in the gross estate for Federal estate tax purposes the proceeds of certain life insurance policies and certain Missouri real estate. A claim for refund was filed for so much of the estate tax as was attributable to the inclusion of the value of the insurance policies in the gross estate. This claim for refund based on the insurance was rejected and suit was then brought to recover the alleged over-payment resulting from the inclusion of the value of the insurance policies in the gross estate and the executors recovered upon this insurance claim. Later, the executors filed a second claim for refund of so much of the Federal estate tax as was attributable to the mistaken inclusion of the Missouri real estate in the gross estate. This claim based upon the real estate was also rejected. The executors then sued in a second action on the

last rejected claim which involved the real estate. The Government pleaded the judgment in the first action as a bar to the second action. From the foregoing statement it is plain that the executors in the *Guettel* case had in the beginning two fully matured claims both arising out of the same subject matter—one on the insurance and one on the real estate—prior to the beginning of the first action, and the Court held that the first action was *res adjudicata* of the issues in the second action on the theory that a judgment on the merits is conclusive upon "all matters which might have been decided" in the first action. It is plain that in the *Guettel* case both the insurance claim and the real estate claim could have been litigated in the first action, *i.e.*, they were one and the same claim and not a new or different claim or as expressed by the Court in that case:

> "* * * the cause of action for the recovery of the whole excess arose out of one transaction and was a single cause of action, regardless of the number of grounds upon which the tax was excessive."

In the case at bar no cause of action embracing said attorneys' fees existed until after the dismissal of said Action No. 1. The existence of the Petitioners' cause of action in this Action No. 2 was wholly dependent upon their second claim for refund, because Petitioners had two causes of action and not one cause of action as in the *Guettel* case. The Petitioners in the case at bar were not splitting up their claim for the recovery of the overpayment of Federal estate tax payments nor were they proceeding piece-meal, nor did they present in said Action No. 1 only a portion of their claim, nor were they leaving another ground to be presented in a subsequent action. Said Action No. 1 as it stood at the time of the dismissal thereof presented every issue that could have been litigated therein because the Petitioners at the time of said dismissal owed no attorneys' fees and these fees only came into existence as a claim against Petitioners subsequent to the dismissal of said Action No. 1, *i.e.*, said Action No. 1 was

dismissed in July, 1942, and the bill for said attorneys' fees was not rendered—demanded—of Petitioners until August 1, 1942. We have already seen that there can be no recovery of attorneys' fees until a demand is made therefor.

In the case at bar there was no matured claim for attorneys' fees either at the time of the beginning of or at the time of the dismissal of said Action No. 1 and no factual basis existed upon which to claim said attorneys' fees in whole or in part in said Action No. 1 and any such claim would have been premature if made at any stage of said Action No. 1. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816. The Circuit Court misapprehended the distinctions existing between the *Guettel* case and the case at bar and quoted language from the *Guettel* case which has no application here. Therefore, it appears that the *Guettel* case has no application whatsoever to the case at bar nor does *Tucker* v. *Alexander*, 275 U. S. 228, cited by the Circuit Court have any such application.

This case on the phase of *res adjudicata* comes right down to this clean-cut issue, *i.e.*, is it governed by those cases in this Court which held that:

> "The case * * * is governed by the principal that where the second cause of action (this Action No. 2) between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered'?" (*Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661, p. 671.)

or is it governed by those cases in this Court which hold that a judgment if rendered upon the merits is conclusive not only as to all matters which were decided but as to all matters which might have been decided such as *U. S.* v. *Parker*, 120 U. S. 89; *Northern Pacific R. Co.* v. *Slaght*, 205 U. S. 122.

It is Petitioners' claim that cases such as the *Mercoid* case govern the instant case because this Action No. 2 is based upon a new claim entirely different from any claim involved in said Action No. 1. There was no claim for said attorneys' fees extant at the time of the beginning or at the time of the dismissal of said Action No. 1 and whatever was decided by its dismissal with prejudice was an adjudication "only as to those matters in issue or points contraverted" and a reference to the complaint in Action No. 1 which was the only pleading in that action (the defendant not having answered) will show that the scope of whatever was adjudicated in that Action No. 1 could not have embraced anything in reference to said attorneys' fees because said fees were not and could not have been an issue in said Action No. 1, and that "the finding or verdict rendered" by such dismissal in said Action No. 1 covered only the issues there involved.

This Court has held that in such a case the pleadings are to be examined in order to determine what was decided by the findings or verdict rendered *i.e.*, the dismissal of said Action No. 1 with prejudice. *Bates* v. *Bodie*, 245 U. S. 520. The complaint in Action No. 1, which was the only pleading extant when said Action No. 1 was dismissed, will be searched in vain for any issue which would involve said attorneys' fees (R., 47, 48, *et seq*). The Circuit Court failed to mention in its opinion the case of *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, where the plaintiff did exactly what the Circuit Court says the Petitioners herein should have done in said Action No. 1, *i.e.*, assert by way of amended claim for refund said attorneys' fees, but the plaintiff in that case was at the request of the Commissioner of Internal Revenue defeated, because the Court said:

> "Should the amount of the attorney's fees for the prosecution of this litigation for refund, which amount is still in an undetermined sum, be deducted from the gross estate as an expense of the estate, for the purposes of determining the Federal Estate Tax? * * *

> The plaintiff's claim for deduction from the gross estate for the purposes of computing the Federal Estate Tax of the, as yet undetermined, amount of the attorneys' fees for this litigation in my opinion must be denied. * * * the claim is for an indefinite amount and for a prospective expense not yet accrued or determined, I hold that the claim for refund which was filed by Mr. Kaul's executors was insufficient to allow that part of this suit which makes claim for reduction of the estate by the amount of attorney's fees. My conclusion is based on the insufficiency and prematurity of the claim for refund and the claim itself. * * *"

There is nothing in the Circuit Court's suggestion that so much of said attorneys' fees as were earned up to the time the first claim for refund was filed is barred because an attorney is at liberty to await the conclusion of a litigation before he bills his client and he need not bill a client piecemeal. The fact that the attorneys awaited the conclusion of the litigation in said Action No. 1 and did not bill Petitioners until such conclusion does not bar this Action No. 2. Nor is there anything in the Circuit Court's suggestion that the estate tax was assessed and paid as a single tax. Such is obviously not the case with which we are now dealing. The Circuit Court simply borrowed this expression as to "a single tax" from *Guettel* v. *U. S.*, but the expression has no place in the instant case because we have shown the facts herein involved to be totally different from the facts involved in the *Guettel* case.

The Circuit Court also laid stress upon the fact that successive suits may be brought under the circumstances of this case and that the attorneys' fees in each case constitute an "administration expense" of the estate which has the effect of further reducing the tax. A complete answer to this observation by the Circuit Court is that the whole train of circumstances stems from the fact that the Commissioner of Internal Revenue originally unlawfully seized the Petitioners

property and if successive suits are necessary under such circumstances then the Commissioner should be the last one to complain.

There was therefore, no *res adjudicata* of the issues in this Action No. 2 by said Action No. 1 and the judgment of the Circuit Court should be reversed.

POINT C.

THE CIRCUIT COURT WAS WITHOUT JURISDICTION TO REQUIRE THAT THE ISSUES ASSERTED IN THIS ACTION NO. 2 SHOULD HAVE BEEN ASSERTED IN SAID ACTION NO. 1.

It is elementary that no court can come to a valid judgment unless it has jurisdiction over the claim in question. Thus it has been held by this Court that if a second installment of a claim becomes due after the institution of an action upon a first installment there can be no recovery on the second installment until and unless a supplemental complaint has been filed in which supplemental complaint said second installment is pleaded. If the Court undertakes to render judgment on the second installment without a supplemental complaint having been filed the Court is without jurisdiction and its judgment as to the second installment is void. This Court in *United States* v. *Worley*, 281 U. S. 339, involving this point, said:

> "But the certificate does not disclose any supplemental petition in respect of such installments, and the judgment should not include them. *Hamlin* v. *Race*, 78 Ill. 422; *Carter-Crume Co.* v. *Peurrung*, 40 C. C. A. 150, 99 Fed. 890."

In the *Carter-Crume* case just cited the holding was that a plaintiff was not bound to file a supplemental complaint for an installment coming due after the institution of a suit and that the installment coming due after the institution of

the first suit was a proper subject of a second action. The Court in the *Carter-Crume* suit, said:

> "It may be that, upon leave of court, the plaintiff, by supplemental petition, might have included in the former suit all the installments which had fallen due after the filing of the original petition, but he was under no obligation to do so."

It was held in the *Carter-Crume* case that there was no *res adjudicata* by the failure of plaintiff to supplement his complaint. Attention is called to the fact that Judges Taft, Lurton and Day constituted the Circuit Court which decided the *Carter-Crume* case and that this Court has cited the *Carter-Crume* case with approval in *United States* v. *Worley,* 281 U. S. 339. Even if Petitioners had had the option to include said attorneys' fees in said Action No. 1 (which option they did not have):

> "A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action. Freeman, Judgm. 5th ed. Section. 786."

Larsen v. *Northland Transportation Company,* 292 U. S. 20, page 25 and cases cited.

The attorneys' fees asserted in this Action No. 2 were not a matured claim against Petitioners at the time of the beginning of or at the time of the dismissal of said Action No. 1 and no supplemental complaint having been filed in that Action No. 1 which pleaded said attorneys' fees as an "administration expense" effective to reduce the Federal estate taxes on said estate and the Petitioners not having been bound to file such supplemental complaint on an unmatured claim and being privileged to bring this Action No. 2 wherein said attorneys' fees are asserted for the purpose of reducing said Federal estate taxes, the Circuit Court was utterly with-

out jurisdiction to find or hold that said claim for attorneys' fees could or should have been asserted in said Action No. 1.

The Circuit Court has, therefore, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The judgment of the Circuit Court should, therefore, be reversed.

CONCLUSIONS.

It is, therefore, because of the manifest errors of the Circuit Court, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that a question of public importance be reviewed and settled and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Dated: New York City, N. Y., June 6th, 1945.

EARL A. DARR,
Counsel for Petitioners.